Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

..... Term, ...

No. 78-1360

IN RE: LEASE OF COAL ON COUNTY LANDS SITUATE IN HEMPFIELD TOWNSHIP, WESTMORELAND COUNTY, PENNSYLVANIA.

FRED FIORE, AGGRIEVED PARTY,
Petitioner,

COUNTY OF WESTMORELAND,
Respondent,

WEISS BROTHERS LEASING, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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IN THE

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No. .....

IN RE: LEASE OF COAL ON COUNTY LANDS SITUATE IN HEMPFIELD TOWNSHIP, WESTMORELAND COUNTY, PENNSYLVANIA

FRED FIORE, AGGRIEVED PARTY,
Petitioner,

COUNTY OF WESTMORELAND,
Respondent,

WEISS BROTHERS LEASING, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Fred Fiore, an aggrieved party and the petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Pennsylvania in the above entitled case, dated the 29th day of November, 1978, and entered on the 5th day of December, 1978.

Opinions Below

The judgment of the Supreme Court of Pennsylvania at issue is by *per curiam* order at No. 1677 Allocatur Docket, on November 29, 1978 and entered December 5, 1978. The *per curiam* order is unreported, and is printed in Appendix A hereto, *infra*, page 15. The effect of the Order of November 29, 1978 is to deny the Petition for Allowance of Appeal by Fred Fiore to the Supreme Court of Pennsylvania, affirming the Order of July 10, 1978 of the Commonwealth Court of Pennsylvania at No. 1890 Commonwealth Docket 1977, which affirmed the Order of August 19, 1977 of the Court of Common Pleas (Court *en Banc*) of Westmoreland County, Pennsylvania, at No. 2618 of 1975, disapproving the subject lease of coal rights to the petitioner. The Order and Opinion of July 10, 1978 of the Commonwealth Court of Pennsylvania is printed in Appendix B hereto, *infra*, page 16; the Order and Opinion of the Court *en Banc* of Westmoreland County, Pennsylvania is printed in Appendix C, hereto, *infra*, page 23.

The Opinion and Order of September 19, 1975 of the Court *en Banc* of Westmoreland County, Pennsylvania at No. 2618 of 1975 is printed in Appendix D, hereto, *infra*, page 33; and the Opinion and Order of July 16, 1976 of the Commonwealth Court of Pennsylvania at No. 1480 Commonwealth Docket 1975, remanding the matter to the Court of Common Pleas of Westmoreland County, Pennsylvania is printed in Appendix E, hereto, *infra*, page 35.

Statement of Jurisdiction

The judgment of the Supreme Court of Pennsylvania (Appendix A, *infra*, page 15) was entered on December 5, 1978. The jurisdiction of the Supreme Court of the United States is invoked under the United States Code, Title 28, Section 1257 (3).

Statement of the Questions Involved

I. Whether it was an abuse of discretion by the Court of Common Pleas of Westmoreland County, Pennsylvania, as affirmed by the Commonwealth and Supreme Courts of Pennsylvania, to arbitrarily refuse approval of the lease by the Westmoreland County Commissioners to petitioner for mining coal under county lands, where the lease was a discretionary decision within the statutory authority of the Commissioners, and not subject to judicial review except for fraud, official misconduct, or arbitrary and capricious abuse of power?

II. Whether the Court's arbitrary refusal to approve a lease, made in conformity to and in reliance on statutory law, is unconstitutional where:

A. The Court's abuse of discretion is an encroachment of the judicial function upon a discretionary, executive decision; and

B. The Court's abuse of discretion works an impairment of a property and contractual right of petitioner?

Statement of Constitutional Provisions and Statutes Involved

Your petitioner seeks relief in accord with the United States Constitution, and case law thereunder, as follows:

Article I, Section 10 of the United States Constitution which provides in part:

> "No state shall . . . pass any Bill of Attainder, ex post facto law, or law impairing the obligation of contracts . . . ";

And Section I of the Fourteenth Amendment to the United States Constitution which provides in part:

". . . No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law . . ."

The authority for the lease in question falls within procedures prescribed by the Pennsylvania Legislature under two provisions. The procedure for lease or sale of county institution district land is set forth in Section 2255 of the "County Institution District Law", Act of June 24, 1937, P.L. 2017, Article III, Section 305; 1949, April 21, P.L. 704, Section I; 1951, September 29, P.L. 1619, Section I; 1955, October 7, P.L. 662, Section I; 1956, February 10, P.L. (1955) 1020, Section I; 62 Purdon's Statutes (P.S.), Section 2255(c), which provides in part:

"Powers and duties as to county institution district property.

As a function of the institution district and with its funds, the commissioners of each county shall have the power and it shall be their duty: . . . c. with the approval of the Court of Quarter Sessions of the Peace, upon such notice as the Court may require, to sell or lease real property of the institution district . . ."

County Commissioners are granted the general power to sell or lease real property under Section 2306 of the County Code, Act of August 9, 1955, P.L. 323, Section 2306, 16 P.S. Section 2306, which provides:

"The board of commissioners may sell or lease, either as lessor or lessee, any real property belonging to the county or to others where the county is lessee. In the event of such sale or of a lease as lessor under which the lessee acquires on a royalty basis or otherwise the right to drill for oil or gas or to mine or remove coal, stone or other mineral products or to cut and remove trees, stumps, wood or other forest products, the commissioners shall petition the Court of Common Pleas, setting forth a description of the property to be sold or lease and the reason therefor. If the commissioners know or have reason to believe that the property to be sold contains oil, gas, coal, stone, timber or other mineral or forest products or commercial value, such knowledge or belief shall be stated together with the description. The Court shall thereupon fix a day for hearing, notice of which shall be given in at least two newspapers, in said county, of general circulation, once a week for three consecutive weeks.

After hearing, the Court shall make such order and decree as shall seem right and proper. In the case of any lease of county property hereunder, such property, with any and all improvements or additions thereon or thereto, shall, in the hands of the lessee, be subject to taxation by such county and any other political subdivision therein, in the same manner as other real estate located in the county. Such taxes shall be levied and assessed against and paid by the lessee. This section shall not apply to leases or sales of county property or other property which are otherwise specifically provided for by law. 1955, Aug. 9, P.L. 323 Section 2306."

Statement of the Case

Petitioner, Fred Fiore (hereafter referred to as Fiore) is the owner of the Fiore Coal Company, which conducts coal mining operations in the Western Pennsylvania Area. Fiore and other persons became interested in coal deposits located on Westmoreland County Institution District land situate in Hempfield Township, Westmoreland County, Pennsylvania, and on which is located Westmoreland Manor, a home for the aged. On January 23, 1975, the Board of Commissioners of Westmoreland County (hereafter referred to as Commissioners) authorized the County Solicitor to prepare a proposal to advertise for the sale or lease of the coal on Westmoreland Manor which was to include testing and an option to mine.

On February 13, 1975, the Westmoreland County Solicitor, by unanimous agreement of the Commissioners, was authorized to prepare an advertisement for strip mining and deep mining of coal on the county land where the Westmoreland County Home for the Aged is presently located, with specifications that each bidder would submit bids in alternate form to either pay the County on a per tonnage basis or on the basis of a per centage of the sale price of the coal, and with further specification that no bid would be considered unless it contained bids for both strip mining and deep mining, reserving the right of the County to reject any or all bids.

On April 24, 1975, the Commissioners unanimously agreed to award a contract to respondent, Weiss Brothers, Inc., of McKeesport, Pennsylvania, only for drilling and test boring on the coal site at Westmoreland Manor. Subsequently at a meeting of the Commissioners on July 24, 1975, upon motion of Commissioner Robert Shirey, seconded by Commissioner Dorothy Shope, it was unanimously agreed to award the bid for strip mining of coal on the subject property, to Fred Fiore Coal Company on a per centage basis with the minimum return to the County of not less than $5.27 per ton, subject to Court approval.

The hearing for the required Court approval was held on September 19, 1975, before the Court *en Banc* of the Court of Common Pleas of Westmoreland County, Pennsylvania (hereafter referred to as Court *en Banc*), the Honorable David H. Weiss, President Judge, presiding with the Honorable L. Alexander Sculco, Judge and the Honorable Richard E. McCormick, Judge. Prior to that hearing, certain parties claiming to be interested in the approval of the contract to Fiore intervened to oppose the award of the contract to the Fiore Coal Company, and consequently appeared at the hearing of September 19, 1975. At the hearing of September 19,

1975, arguments of counsel for the Commissioners and for the respective parties were presented, but no testimony of any person was taken. The Court *en Banc* then issued the Order of September 19, 1975, at No. 2618 of 1975 (Appendix D), disapproving the award of the lease to the subject property to Fred Fiore and setting forth its reasons for doing so. Fiore then filed an appeal to the Commonwealth Court of Pennsylvania at No. 1480 Commonwealth Docket 1975.

Petitioner was made aware of the fact that on October 9, 1975, at a meeting of the Commissioners, that a motion was made by Commissioner Shope, seconded by Commissioner Ted Simon, and passed by Commissioners Shope and Simon with Commissioner Shirey abstaining, to authorize the County Solicitor to petition the Court *en Banc* to lease the rights to the coal on the subject property to the respondent, Weiss Brothers Leasing, Inc. This award to Weiss Brothers Leasing, Inc. by the Commissioners was done without any advertising or rebidding of the lease contract. Fiore then petitioned the Commonwealth Court of Pennsylvania for a Writ of Supersedeas preventing any proceedings concerning the award of the subject property until his appeal was heard. The Supersedeas was granted on November 18, 1975.

The matter came before the Commonwealth Court of Pennsylvania on the appeal of Fiore at No. 1480 Commonwealth Docket 1975, and by Order dated July 16, 1976 (Appendix E), the decision of the Westmoreland County Court *en Banc* was remanded for an evidentiary hearing and decision on facts established on the record.

The Westmoreland County Court *en Banc* held evidentiary hearings on April 1, 1977 and June 17, 1977, and by opinion and decree dated August 19, 1977 (Appendix C) at No. 2618 of 1975, disapproved as it had previously done, the award of

the coal lease to Fiore. However, the record of this hearing discloses no allegations or evidence of fraud, official misconduct, or arbitrary and capricious abuse of power in the award of the coal lease to Fiore on July 24, 1975.

Fiore again appealed to the Commonwealth Court of Pennsylvania at No. 1890 Commonwealth Docket 1977, which by Opinion and Order dated July 10, 1978 (Appendix B) affirmed the Order of August 19, 1977 of the Westmoreland County Court *en Banc*.

Fiore then petitioned the Supreme Court of Pennsylvania at No. 1677 Allocatur Docket for Allowance of Appeal from the Order of the Commonwealth Court of Pennsylvania dated July 10, 1978. The Petition for Allowance of Appeal was denied by *per curiam* order of the Supreme Court of Pennsylvania dated November 29, 1978 and entered December 5, 1978 (Appendix A), from which follows this Petition for Writ of Certiorari to the Supreme Court of the United States.

The issues now before this Honorable Court were asserted by Fiore through counsel in argument before the Court of Common Pleas of Westmoreland County, Pennsylvania at hearing on September 19, 1975, Fiore's Petition for Rehearing before the Court of Common Pleas (Appendix F), argument and objections of Fiore's counsel at hearing before the Court of Common Pleas on April 1, 1977, successive appeals to the Commonwealth Court of Pennsylvania, and Petition for Allowance of Appeal to the Supreme Court of Pennsylvania (Appendix G).

REASONS FOR GRANTING THIS WRIT

I. It was an abuse of discretion by the Court of Common Pleas of Westmoreland County, Pennsylvania, as affirmed by the Commonwealth and Supreme Courts of Pennsylvania, to arbitrarily refuse approval of the lease by the Westmoreland County Commissioners to the petitioner for mining coal under county lands. The lease was a discretionary decision within the statutory authority of the Commissioners, and not subject to judicial review under Pennsylvania law except for fraud, official misconduct, or arbitrary and capricious abuse of power.

The lease which is the subject of this action falls under procedures prescribed by the Pennsylvania Legislature under two statutes: Section 2255 of the County Institution District Law (62 P.S. Section 2255) and Section 2306 of the County Code (16 P.S. Section 2306). Both statutes require only procedurally that the County Commissioners petition for Court approval of the lease, and that notice of the hearing for approval be given by newspaper advertisement; neither statute states standards to be applied by the Court in determining approval or disapproval.

It is held that the County Commissioners, as fiduciaries for the citizens of the County, exercise their discretion in obtaining a buyer or lessee of county land. *Heilig Bros., Inc. v. Kohler*, 366 Pa. 72, 76 A. 2d 613 (1950). The Court then passes upon the exercise of discretion by the Commissioners, and approves or disapproves the sale or lease. The scope of review by the Court is limited; the Court will not review the decisions of public officials involving acts of discretion in the absence of fraud, official misconduct, bad faith, capricious actions or abuse of power; nor will the Court inquire into the

wisdom of such actions, or into the details of the manner adopted to carry them into execution; nor will the Court attempt to interfere with or control the performance of discretionary acts by public officials; nor will the Court attempt to substitute its judicial discretion for administrative or legislative prerogatives. *In Re Petition of Acchione*, 425 Pa. 23, 227 A. 2d 816 (1967). It is stated in *Blumenschein v. Pittsburgh Housing Authority*, 379 Pa. 566, that:

> "Thus we are of the opinion that when the legislature adopted the County Code and included the requirement of court approval for sales of county owned property by the commissioners after a hearing, the intent was not to have the Court second guess the county commissioners as to the wisdom of their action. Rather, the legislature intended that our review, and, therefore, the scope of the hearing, be limited to matters of bad faith, fraud, capricious action or abuse of power."

Judicial discretion has been described by the Courts of Pennsylvania and the United States as:

> "Judicial discretion requires action in conformity with law upon the facts and circumstances before the Court after hearing and due consideration. In *Osborn v. United States Bank*, 9 Wheat, 738, 866, 6 L. Ed. 204, Chief Justice Marshall said: 'Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the Court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law.' " *In Re Philadelphia County Grand Jury*, 347 Pa. 316, 32 A.2d 199 (1943).

In the instant case, the Court *en Banc* of Westmoreland County, Pennsylvania was obligated to exercise its discretion in accordance with the law; that is, to disapprove award of the coal lease to Fiore only upon proof of bad faith, fraud, capricious action or abuse of power on the part of the Commissioners. It was, therefore, an abuse of discretion under Pennsylvania law to disapprove the lease to Fiore where there was no evidence of bad faith, fraud, capricious action or abuse of power.

II. The Court's arbitrary refusal to approve the lease to Fiore, made in conformity to and in reliance on statutory law, is unconstitutional, where:

A. The Court's abuse of discretion is an encroachment upon a discretionary, executive decision: and

B. The Court's abuse of discretion works an impairment of valuable property and contractual rights of petitioner.

In accord with the most basic constitutional concept of separation of powers between the various branches of government, it has been held by this Court that actions of the executive branch, represented by the Westmoreland County Commissioners in this case, will not be disturbed, except for fraud, or where an action is beyond the scope of executive authority. *Illinois C.R. Company v. Greene*, 244 U.S. 555, 562, 61 L. Ed. 1309, 37 S. Ct. 697 (1916); *Louisville & N.R. Company v. Greene*, 244 U.S. 522, 61 L. Ed. 1291, 37 S. Ct. 683 (1916); *Ross v. Day*, 232 U.S. 110, 117, 58 L. Ed. 528, 34 S. Ct. 233 (1913); *New Orleans v. Paine*, 147 U.S. 261, 37 L. Ed. 162, 13 S. Ct. 303 (1892).

It is further held that even where a court, in the exercise of its jurisdiction, reviews discretionary acts of public officials, the decisions of the public officials will not be disturbed in the absence of showing of fraud, abuse of discretion, or ar-

bitrary and capricious acts as vitiate the official character of the action. *United States v. California & O. Land Company*, 148 U.S. 31, 43-44, 37 L. Ed. 354, 13 S. Ct. 458 (1892). The abuse of discretion by the Court here, in assigning reasons for its disapproval of the coal lease to Fiore that were not within its proper scope of review, compels the conclusion that the Court encroached upon the discretionary, executive decision-making process, in violation of the basic constitutional concept of separation of powers.

It is a long-standing rule of this Court that the clause in the United States Constitution (Article I, Section 10) prohibiting passage of laws impairing obligations of contracts, does not generally apply to changes in judicial decisions. *Tidal Oil Company v. Flanagan*, 263 U.S. 444, 68 L. Ed. 386, 44 S. Ct. 199 (1923); however, it is submitted that the facts of the present case do not bring it within this rule.

Petitioner contends first that the statutes here permitting sale or lease of county lands, if construed to allow unlimited judicial review as to matters other than fraud, official misconduct, capricious action, or abuse of power, are unconstitutionally vague, lacking an adequate standard for review. This Court has held that the provisions of the Fourteenth Amendment, that no state shall deprive any person of life, liberty or property without due process of law, requires that legislatures set reasonably clear standards to be followed by triers of fact, to avoid arbitrary and selective enforcement as occurred in this case. *Smith v. Goguen*, 415 U.S. 566, 573, 39 L. Ed. 2d 605, 94 S. Ct. 1242 (1974).

It is submitted that while a judicial decision, of itself, cannot be said to violate the constitutional prohibitions against impairment of contracts or deprivation of property without

due process of law, the effect of the Court's abuse of discretion in this case is to make an unconstitutional application of an otherwise constitutional statute. The inhibition against such action is held to include all functionaries of state government, judicial as well as legislative. *Kreshik v. St. Nicholas Cathedral of Russian Orthodox Church*, 363 U.S. 190, 4 L. Ed. 2d 1140, 80 S. Ct. 1037, reh. den. 364 U.S. 855, 5 L. Ed. 2d 79, 81 S. Ct. 35 (1960).

As stated in *Winona & St. Peter Railroad Company v. Town of Plainview*, 143 U.S. 371, 36 L. Ed. 191, 200, 12 S. Ct. 530 (1891):

> "This Court has jurisdiction only when the State Court has given effect to a legislative enactment which impairs the obligation of a prior contract."

In accord: *Tidal Oil Company v. Flanagan*, 263 U.S. 444, 453, 68 L. Ed. 386, 44 S. Ct. 199 (1923). This Court has not hesitated to strike down the unconstitutional application by a Court of a constitutional statute. *Allee v. Medrano*, 416 U.S. 802, 40 L. Ed. 2d 566, 94 S. Ct. 2191 (1974). The Court should do so here where arbitrary refusal of the lower Court to approve the award of the coal lease to Fiore has the effect of depriving him of a valuable property without due process of law, and of impairing a contractual right duly created with the County Commissioners, acting within their statutory discretion and authority.

Conclusion

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioner.

APPENDIX A

Judgment and *Per Curiam* Order of November 29, 1978 of the Supreme Court of Pennsylvania at No. 1677 Allocatur Docket

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528 St. Clair Avenue
Clairton, Pa. 15025

In Re: Lease of Coal on County Lands, etc. Fiore, etc., et al. No. 1677 Allocatur Docket

Gentlemen:

The Court has entered the following Order on your Petition for Allowance of Appeal from the decision of the Commonwealth Court in the above-captioned matter:

"29 November 1978

Petition denied.

Per Curiam"

Very truly yours,

DEPUTY PROTHONOTARY

ITG:erv
cc: Irving L. Bloom, Esquire
Thomas Anton, Esquire

APPENDIX B

Opinion and Order of July 10, 1978 of the Commonwealth Court of Pennsylvania at No. 1890 Commonwealth Docket 1977

IN THE

COMMONWEALTH COURT OF PENNSYLVANIA

IN RE: LEASE OF COAL ON COUNTY LANDS SITUATE IN HEMPFIELD TOWNSHIP, WESTMORELAND COUNTY, PENNSYLVANIA

FRED FIORE, AGGRIEVED PARTY,

Appellant.

No. 1890 C.D. 1977

Before: HONORABLE GLENN E. MENCER, *Judge*
HONORABLE THEODORE O. ROGERS, *Judge*
HONORABLE RICHARD DiSALLE, *Judge*

Argued: MAY 4, 1978 - PITTSBURGH

OPINION BY JUDGE ROGERS FILED: JULY 10, 1978

Fred Fiore, owner of Fiore Coal Company, has appealed for the second time from an order of the Court of Common Pleas of Westmoreland County denying the prayer of a petition of the County Commissioners for the court's approval of a proposed lease to him of county owned lands for coal mining purposes. On the occasion of the earlier appeal we reversed an order of the court below refusing approval of

a proposed lease to Fiore and remanded the record for an evidentiary hearing. *In Re: Lease of Coal on County Lands Situate in Hempfield Township, Westmoreland County, Pennsylvania,* 25 Pa. Commonwealth Ct. 530, 360 A.2d 849 (1976). In response to our order the court below conducted evidentiary hearings and thereafter again refused approval of the proposed lease. That action is the subject of this appeal.

In the opinion accompanying our order when the matter was last before us, we set forth what then appeared to be the circumstances. Since a hearing has been conducted and an evidentiary record made, we will here recite the facts surrounding this lamentable imbroglio. The Commissioners of Westmoreland County by public advertisement invited the submission on or before March 18, 1975 of bids for the mining of coal by strip mining and by deep mining on county land. The advertisement required that bids should be submitted in the form of two alternates for payment: (1) payment based on tonnage of coal removed, or (2) payment based upon a percentage of the per ton sale price of the coal by the contractor. The invitation included the following provision which caused some, if not most, of the trouble which ensued:

> "Investigation as to the location and amount of coal on the premises shall be at the cost of the bidder. If, after investigation, the highest responsible bidder determines, at that bidder's option, that it is not economically feasible to mine the said coal, the County Commissioners shall excuse that bidder and offer the bid to the next highest responsible bidder, and so on."

Nine bids were submitted for the work. The two with which we are here concerned were those of the appellant Fiore in the amount of $5.11 per ton of coal or 21% of the per ton sale price of coal, and of Weiss Brothers Leasing, Inc. in the amount of $5.27 per ton of coal or 13.17% of the per ton sale price of the coal. On April 24, 1975 the commissioners made an award to Weiss Brothers of the right of "drilling and test boring on the site." The county solicitor testified that it was his understanding of the April 24, 1975 action of the commissioners that all of the bidders were to be accorded the right to perform drilling and test boring operations. Weiss Brothers, however, adduced testimony to the effect that the county solicitor advised them to draw up a lease under which they might mine the coal. A lease was prepared by Weiss Brothers and submitted to the county commissioners. It has never been executed.

On July 24, 1975 the commissioners unanimously adopted a resolution awarding the right to mine the property under lease to the appellant Fiore at a price of $5.27 per ton, or 21% of the per ton sales price. It is to be noted that the per ton price of $5.27 is not that originally bid by Fiore ($5.11 per ton), but that it is the same per ton amount offered by Weiss Brothers. The percentage of sales price per ton at which the proposed lease was awarded to Fiore was that offered by Fiore and one which is considerably in excess of the amount bid by Weiss Brothers (13.17%). No reference to any prior dealings with Weiss Brothers appears to have been made when this resolution was adopted.

The commissioners next caused to be prepared and to be presented to the Court of Common Pleas of Westmoreland

County their petition asking the court's approval of a proposed lease to Fiore on the terms fixed in their resolution of July 24, 1975, pursuant to Section 2306 of The County Code, Act of August 9, 1955, P.L. 323, *as amended*, 16 P.S. § 2306. As we have noted, the court below disapproved of the award of the proposed lease agreement to Fiore. This action of the court below was taken on September 19, 1975. Fiore then appealed to this Court. While the matter was pending here the commissioners undertook: (1) on October 9, 1975, without taking any action to rescind their award to Fiore, to award the lease to Weiss Brothers for their original bid, $5.27 per ton or 13.17% of per ton sales price; (2) at some undisclosed time after October 9, 1975, to petition the court below to approve the award of a lease to Weiss Brothers; and (3) on December 31, 1975, to petition the court below for leave to withdraw both their petitions for the approval of leases.[1]

Section 2306 of The County Code, 16 P.S. § 2306, requires commissioners proposing to lease as lessor the right to mine coal on county property to petition the court which "[a]fter hearing . . . shall make such order or decree as shall seem right and proper . . . ." The order which seemed right and proper to the court below in the circumstances hereinbefore described was one disapproving the proposed lease agreement with Fiore. The court below believed, and we agree, that there were a number of remarkable features of this contracting process which required its action of disapproval. First,

[1] After the commissioners' action of October 9, 1975, Fiore filed an application in Commonwealth Court for supersedeas of the order then on appeal which we granted, and which had the effect of holding in abeyance the matter of the commissioners' petition for approval of the proposed Weiss Brothers' lease.

there was a patent misunderstanding on the part of the commissioners, their solicitor and Weiss Brothers as to what was awarded to Weiss Brothers by the resolution of April 24, 1975—was it merely a right to drill and make test borings or was it a lease of mining rights? Their then solicitor, an able lawyer, did not consider that action as a present award of the right to mine the coal on the property; Weiss Brothers did and has a lease prepared. The quoted part of the invitation suggests that it might have been only an offer to Weiss Brothers to test the feasibility of mining the coal. Next, the process by which Fiore's bid per ton of coal in the amount of $5.11 became an award at a bid of $5.27 per ton is uncertain on the record—was it the result of private negotiations between one or more of the commissioners and Fiore, or was it, as one of the commissioners testified, a unilateral suggestion of this Commissioner? Further, except for the fact that Fiore has supported the county's petition for approval of a lease to him on the amended terms, there is no other record of his acquiesence in the increased price per ton. And then there are the actions of the Commissioners in later awarding the lease to Weiss Brothers on October 9, 1975 without rescinding the earlier award to Fiore, and finally, in apparent despair over the whole matter, seeking to withdraw both applications on December 31, 1975.

In our earlier opinion we remarked briefly on the law as follows:

> "It is true that the power conferred upon the Commissioners by Section 2306 is discretionary, and when public officials take action in discretionary matters a presumption arises that they are properly acting for the public good. Parker v. Philadelphia, 391 Pa. 242, 137 A.2d 343 (1958). Normally they may not be restrained from acting absent allegation and proof of fraud, misconduct, abuse of discretion, or capricious and arbitrary conduct. Hyam v. Upper Montgomery Joint Authority, 399 Pa. 446, 160 A.2d 539 (1960). However, Section 2306 requires that the court, in approving the lease, exercise its sound discretion as well. See Baton Coal Company Appeal, 365 Pa. 519, 76 A.2d 194 (1950), and McKees Rocks Borough School District Petition, 360 Pa. 285, 62 A.2d 20 (1948)." 25 Pa. Commonwealth Ct. at 534, 360 A.2d at 851.

We are fully satisfied that the court below in the circumstances of this case exercised a sound discretion in refusing to approve the proposed lease to Fiore.

Weiss Brothers, who intervened, suggest that we should affirm the order below so that the court of common pleas might take up the matter of the validity of what they assert was the award of mining rights to them made by the Commissioners on April 24, 1975. The commissioners have never petitioned the court to approve their action of April 24, 1975 so that that matter is not and has never been before the court. It seems to us that what is properly before the court below with respect to this litigation, now that the proposed lease to Fiore has been disapproved, is the petition of the commissioners to withdraw their petition for approval of a proposed lease to Weiss Brothers. In view of the misadventures which have befallen the invitation instituted in 1975 and the fact that the bids then submitted are more than three years old, it would seem to us that the public interest would be best served by acceding to

the commissioners' apparent intention to terminate this ill-starred venture.

Order affirmed.

THEODORE O. ROGERS,
Theodore O. Rogers, *J.*

Judge DiSalle dissents.

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

IN RE: LEASE OF COAL ON COUNTY LANDS SITUATE IN HEMPFIELD TOWNSHIP, WESTMORELAND COUNTY, PENNSYLVANIA

FRED FIORE, AGGRIEVED PARTY,
Appellant.

NO. 1890 C.D. 1977

ORDER

AND NOW, this 10th day of July, 1978, the order below made August 19, 1977 is affirmed.

THEODORE O. ROGERS,
Theodore O. Rogers, *J.*

CERTIFIED FROM THE RECORD
JUL 10 1978
FRANCIS C. BARBUSH
CHIEF CLERK

APPENDIX C

Opinion and Order of August 19, 1977 of the Court of Common Pleas (Court *en Banc*) of Westmoreland County, Pennsylvania at No. 2618 of 1975 (Westmoreland County)

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA

CIVIL ACTION—LAW

IN RE: Lease of coal on county lands situate in Hempfield Township, Westmoreland County, Pa.

No. 2618 of 1975

Before: David H. Weiss, *P.J.*
L. Alexander Sculco, *J.*
Richard E. McCormick, *J.*

Sitting *En Banc*

By the Court *en Banc:*
(Opinion by McCormick, *J.*)

This matter comes before the Court *en Banc* on Petition of the Board of Commissioners of Westmoreland County for approval of a lease agreement for coal situate in Hempfield Township, Westmoreland County, Pennsylvania owned by the Westmoreland County Institution District. (Pursuant to the Act of August 9th., 1955, P.L. 323, Section 2306 (16 P.S. 2306).

On February 13, 1975, the Westmoreland County Commissioners directed the County Solicitor to prepare an advertisement for strip mining and deep mining of coal on certain County-owned lands. The advertisement specified that each bidder would submit bids in alternate form, either to pay the County on a price per ton basis or on the basis of a percentage of the sale price of the coal, and that no bid would be considered unless it contained bids for both strip mining and deep mining. The County reserved the right to reject any and all bids. On March 18, 1975 the bids were opened, there being a total of nine bids submitted. On April 24, 1975 the Commissioners authorized the County Solicitor to proceed with contract with the Weiss Bros. Leasing Inc. of McKeesport, Pennsylvania for the drilling and test boring on the coal site at Westmoreland Manor. The County Solicitor pursuant to the direction of the County Commissioners requested Weiss Bros. Leasing, Inc. to submit a proposed lease agreement for the coal, which it did. That lease agreement was never executed. On July 24, 1975 the Commissioners agreed to award the bid for the strip mining of coal on property owned by Westmoreland County at Westmoreland Manor in Hempfield Township, Westmoreland County, Pennsylvania to Fred Fiore Coal Company on a percentage basis with a minimum return to the County of not less than $5.27 per ton, subject to Court approval. The Commissioners then petitioned the Court of Common Pleas for approval of the Fiore bid, as required by Section 2306 of the County Code. September 19, 1975 was the date fixed for hearing where several intervenors, who had submitted bids pursuant to the advertisement, appeared arguing that an

Appendix C—Opinion and Order of August 19, 1977 of the Court of Common Pleas (Court en Banc) of Westmoreland County, Pennsylvania at No. 2618 of 1975 (Westmoreland County).

award to Fiore Coal Company would be improper and would not be to the best interest of the people of Westmoreland County. No testimony was taken at the hearing on September 19, 1975 but after argument by counsel for all of the parties appearing at the hearing the Court entered an Order disapproving the award of the lease to Fred Fiore Coal Company for the following reasons:

"1. Confusion in advertising.

2. Irregularity in accepting bids of two bidders.

3. The approval of this sale would not be in the best interest of the people of Westmoreland County."

Fred Fiore Coal Company took an appeal to the Pennsylvania Commonwealth Court from that Order.

On the 16th. day of July, 1976 the Commonwealth Court by Order of Judge Theodore O. Rogers reversed the decision of the Lower Court and remanded the matter to the Court for an evidentiary hearing and decision on the facts established on the record.

At the remanded hearing which was held on April 1, 1977 the testimony of H. Reginald Belden, Jr., Esquire, then Solicitor for the County Commissioners, clearly indicates that the award made to Weiss Bros., Inc. of McKeesport, Pennsylvania on April 24, 1975 by the County Commissioners was an award to the highest and best bidder in response to the advertisement soliciting bids (Testimony 19-20). Mr. Belden testified that he felt the award made on July 24, 1975 was also an award made to Fred Fiore Coal Company even though no

formal action was ever taken by the Board of Commissioners rescinding the award to Weiss Bros. nor was any notice given to Weiss Bros. that they weren't the recipients of the award.

Both the Petition for Approval of lease of coal and the proposed lease agreement set forth that the County duly advertised for bids and proposals to accomplish the mining of coal by both strip and deep mine method on the County-owned property and that Fiore bid the advertised proposal for material, labor and services required in order to accomplish the purposes advertised for. The agreement further sets forth that Fred Fiore was determined to be "the highest responsible bidder and has been awarded the said contract for removal of coal by the County under the terms and conditions hereinafter set forth." The proposed agreement, Article 3: contract price, sets forth the following:

> "The contractor shall pay the County for the performance of the contract and for all coal mined the sum as successfully bid and accepted by the County, which is 21% of the sale price of coal mined and sold by the contractor. . ."

The agreement further sets forth:

> "in the event that the said percentage royalty payment to the County, as above computed, shall result in a computed royalty payment of less than $5.27 per ton of 2,000 pounds of coal for any coal sold during any calendar month, then the contractor agrees to pay a minimum royalty price of $5.27 per ton of 2,000 pounds of coal so

> mined and sold, for all such coal mined and sold during the said calendar month period".

The Fiore Agreement was executed only by Fred Fiore.

The actual bid of Fred Fiore Coal Company dated March 18, 1975 is different from that as set forth in the proposed lease agreement now for consideration before this Court. The bid was as follows:

> "(1) Payment to the County based upon the tonnage of coal removed by either strip and deep mining operations ----------$5.11 or, (2) payment to the County based upon the percentage of the per ton sale of the coal obtained by the contractor by strip and deep mining operations ----------21%"

It is obvious that the Petition and proposed agreement do not accurately reflect the action of the Board of Commissioners nor do they reflect the actual bid made by Fred Fiore Coal Company, Inc. The bid submitted by Fred Fiore Coal Company was $5.11 per ton of coal and not $5.27 per ton of coal. As a matter of fact, the bid of $5.27 per ton of coal sold was that of Weiss Bros. Leasing, Inc.

On October 9, 1975 Motion was made by Mrs. Shope, seconded by Mr. Simon and passed by majority vote, with Mr. Shirey abstaining, to authorize the County Solicitor to petition the Court to lease the rights of the coal in Westmoreland Manor property to Weiss Bros.

On December 31, 1975 the Westmoreland County Commissioners advised the County Solicitor to withdraw Petitions to the Court of Common Pleas of Westmoreland County and the Commonwealth Court of Pennsylvania requesting approval for strip mining of coal on the Westmoreland Manor property both at No. 3436 of 1975 and No. 2618 of 1975, being the Petitions of Weiss and Fiore, respectively.

This Court is aware of the law that even though the Court might have a different opinion or judgment in regard to the action of an agency, that is not sufficient legal reason for interference. Judicial discretion must not be a substitute for administrative or legislative prerogatives. Blumenschein v. Pittsburgh Housing Authority, 379 Pa. 566 at 572, 573, 109 Atlantic 2d 331 (1954.)

The Court cannot in good conscience recognize the action of the Board of Commissioners of Westmoreland County on July 24, 1975 as being valid and disregard the actions of the Board of County Commissioners on April 24, October 9 and December 31 of 1975. To do so would amount to the Court substituting its discretion for that of the County Commissioners on the action taken by the Commissioners on all of the dates with the exception of July 24, 1975. It is the opinion of this Court that the various actions of the Board of County Commissioners, *i.e.*, on April 24, 1975, July 24, 1975, October 9, 1975 and December 31, 1975 were not consistent with each other nor are they consistent with the Petition and proposed agreement now before the Court.

There is nothing in the record to indicate how the Commissioners arrived at the figures set forth in the award made on July 24, 1975 to Fiore. It is clear, however, that the figures on which the award were based were not the bid of Fiore in response to the advertisement for bids which were opened on March 18, 1975. A review of the record further indicates that the Commissioners clearly indicated their intention to enter into a lease agreement for the stripping and mining of the coal on the Westmoreland County property with Weiss Bros. Leasing, Inc. This is reflected in the action of the Board of Commissioners on April 24, 1975 and by their request for a proposed lease agreement to be submitted by Weiss Bros. and the testimony of the Commissioner's Solicitor that he felt an award of the contract had been made to the successful bidder, Weiss Bros. The Pennsylvania Supreme Court in the case of Pearlman v. Pittsburgh, *et al.* 304 Pa. 25, page 25, speaking generally as to the concept, stated:

> ". . . it is a novel proposition that the bid of a perfectly responsible party can be ignored. . . . the statute requires that contracts be awarded to the lowest responsible bidder and the Courts hold it is for the municipal authorities to exercise a sound discretion to determine who is such. . . ."

The above quoted opinion of Mr. Justice Walling is supported in a statement by Mr. Justice Kephard speaking for the Court in Hibbs v. Aresnberg, 276 Pa. 24, p. 29 when the Court said:

> ". . .though the Directors were not bound in law to give the contract to the lowest bidder, who might be irresponsible, they were bound to investigate, and if a bidder measured up to the law's requirement as a responsible party, the Board could not capriciously award the contract to another. . ."

The Commissioners in the present case did just this, without notice to Weiss to whom they had already made an award, subject to Court approval or any other party in interest. The opinions were reaffirmed in Summit Hill School District Director's removal, 289 Pa. 82, and quoted with approval in Schuck v. School District of Baldwin Township, 296 Pa. 408, p. 412 when the Court said:

> ". . .the Municipal Authorities having determined who is the lowest responsible bidder, discretion ends and the contract, if awarded, must be given to him. . ."

Based on these facts and the law the obviously private negotiations entered into by the Commissioners and Fiore must be questioned. It is not in the opinion of this Court an abuse of the Court's discretion to inquire into the wisdom of such actions for ". . .an administrative body . . . is not wholly immune from judicial review. . ." In Re: Petition of Acchione, 425 Pa. 30 (1967).

Clearly there were irregularities in the procedure followed by the Commissioners for Westmoreland County.

Although the governing statute is silent on the matter, the case law strongly indicates that the Commissioners are given a choice of three methods of sale:

A. Sealed bids.

B. Public auction.

C. Private sale with approval of the Court.

These three methods were recognized by the Supreme Court in McKees Rocks Borough School District Petition, 360 Pa. 285, 62 Atlantic 2d, 20 (1948). In the instant case, as a result of a newspaper advertisement nine bids were received by the Controller of Westmoreland County, among others Fred Fiore Coal Company submitted a bid based upon the tonnage of coal removed at the rate of $5.11 per ton. The bid of Weiss Bros. offered payment based on the tonnage of coal removed at the rate of $5.27 per ton. Both of these bids were dated March 18, 1975 and were opened by the County Commissioners on that date. Subsequently the bid of Weiss was accepted. Several months later the County Commissioners made an award to Fiore at a price which was different from the actual bid submitted by Fiore.

These inconsistencies cannot be overlooked by the Court. It is the opinion of the Court that the irregularities are such that approval of the Petition now before the Court cannot be given. We therefore enter the following:

Appendix C—Opinion and Order of August 19, 1977 of the Court of Common Pleas (Court en Banc) of Westmoreland County, Pennsylvania at No. 2618 of 1975 (Westmoreland County).

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA

CIVIL ACTION—LAW

IN RE: Lease of coal on county lands situate in Hempfield Township, Westmoreland County, Pa.

No. 2618 of 1975

Before: David H. Weiss, *P.J.*
L. Alexander Sculco, *J.*
Richard E. McCormick, *J.*

DECREE

AND NOW, to-wit: this 19th day of August, 1977, after due and careful consideration of all of the testimony and exhibits submitted after full hearing the Petition of the County Commissioners of Westmoreland County for approval of a proposed lease agreement between Fred Fiore and the County of Westmoreland be and the same is hereby disapproved.

BY THE COURT:
RICHARD E. McCORMICK,
Judge.

Concurring:
L. Alexander Sculco,
Judge.

David H. Weiss, *P.J.*,
Judge.

ATTEST:
Leo Sukala, Prothonotary
Prothonotary.

APPENDIX D

Opinion and Order of September 19, 1975 of the Court of Common Pleas (Court *en Banc*) of Westmoreland County, Pennsylvania at No. 2618 of 1975 (Westmoreland County)

IN THE COURT OF COMMON PLEAS
OF WESTMORELAND COUNTY, PENNSYLVANIA

CIVIL ACTION—LAW

In Re: Lease of coal on County lands situate in Hempfield Township, Westmoreland County, Pa.

No. 2618 of 1975

Heard: September 19th, 1975

Before: DAVID H. WEISS, *P.J.*
L. ALEXANDER SCULCO, *J.*
RICHARD E. McCORMICK, *J.*

Sitting *en Banc*

AND NOW, to wit, this 19th day of September, the Court by unanimous vote, denies the Commissioner's Petition to approve the agreement and lease for the subject coal to Fred Fiore Coal Company. The reasons for same being:

1. Confusion in advertising.
2. Irregularity in accepting bids of two bidders.
3. The approval of this sale would not be in the best interest of the people of Westmoreland County.

Appendix D—Opinion and Order of September 19, 1975 of the Court of Common Pleas (Court en Banc) of Westmoreland-County, Pennsylvania at No. 2618 of 1975 (Westmoreland-County).

This decision is based on the legal arguments presented by counsel for the bidders, intervenors, and the County.

BY THE COURT:

DAVID H. WEISS, *P.J.*,
David H. Weiss, *President Judge*.

CONCURRING:

L. Alexander Sculco
L. Alexander Sculco, *J.*
Richard E. McCormick
Richard E. McCormick, *J.*
ATTEST:
Leo Sukala, Prothonotary
Prothonotary

APPENDIX E

Opinion and Order of July 16, 1976 of the Commonwealth Court of Pennsylvania at No. 1480 Commonwealth Docket 1975

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

In Re: LEASE OF COAL ON COUNTY LANDS SITUATE IN HEMPFIELD TOWNSHIP, WESTMORELAND COUNTY, PENNSYLVANIA

APPEAL OF FRED FIORE, AGGRIEVED PARTY

FRED FIORE,
Appellant.

NO. 1480 C.D. 1975

Before: HONORABLE JAMES S. BOWMAN,
President Judge
HONORABLE GLENN E. MENCER, *Judge*
HONORABLE THEODORE O. ROGERS, *Judge*

ARGUED: MAY 6, 1976 - PITTSBURGH

OPINION BY JUDGE ROGERS FILED: JULY 16, 1976

This is an appeal by Fred Fiore, owner of Fiore Coal Company, from an order of the Court of Common Pleas of Westmoreland County denying a petition for approval of a lease for the mining of coal on land located within Westmoreland County's Institution District. We reverse and remand.

On February 13, 1975, the Westmoreland County Commissioners directed the county solicitor to prepare an advertisement for strip mining and deep mining of coal on certain county-owned lands. The advertisement specified that each bidder would submit bids in alternate form, either to pay the County on a price per ton basis or on the basis of a percentage of the sale price of the coal, and that no bid would be considered unless it contained bids for both strip mining and deep mining. The County reserved the right to reject any or all bids. On April 24, 1975, after several bids were submitted in response to the advertisement, the Commissioners authorized the solicitor to contract with Weiss Brothers Leasing, Inc. (Weiss) for the drilling and test boring on the coal site. Whether a contract of this nature was never executed we do not know. On July 24, 1975, the Commissioners unanimously agreed to award the lease for mining of coal on the site to Fiore on a percentage basis with a minimum price of not less than $5.27 per ton.[1] Fiore's bid, as amended, was clearly the best bid. The Commissioners then petitioned the Court of Common Pleas for approval of the Fiore bid, as required by Section 2306 of The County Code.[2] On September 19, 1975, the date fixed for hearing, the lower court *en banc* engaged in an extended colloquy with counsel representing Fiore, several disappointed bidders and a newly appointed county solicitor. On the same day as the so-called hearing the court below entered a brief order disapproving the award of the lease to Fiore for the following reasons:

[1] Fiore's first bid, entered March 18, 1975, was for $5.11 per ton or 21% per ton sale. Apparently, sometime afterward, private negotiations resulted in the guarantee to the County by Fiore of $5.27 per ton.

[2] Act of August 9, 1955, P.L. 323, *as amended*, 16 P.S. § 2306.

"1) Confusion in advertising.

"2) Irregularity in accepting bids of two bidders.

"3. The approval of this sale would not be in the best interest of the people of Westmoreland County."

Fiore has appealed from that order.

The Westmoreland County Commissioners appear before this Court in the anomolous position of supporting the denial by the lower court of their own petition for approval of the Fiore bid. The Commissioners defend their present position by asserting that confusion existed during the bidding procedure.[3] Weiss, an intervenor, asserts that its bid, having been the first accepted by the Commissioners, should be considered the only valid bid and therefore requests us to remand the matter to the lower court to enable it to pass on the Weiss bid. Fiore contends that the Commissioners wanted Weiss only to make test borings and that he, Fiore, had been awarded the mining lease. Fiore says that the lower court abused its discretion by disapproving the Commissioners' decision.

[3] After the lower court disallowed the Fiore bid, the Commissioners petitioned the lower court for approval of the Weiss bid. A writ of supersedeas from this Court prevented the lower court from considering that petition. Subsequently, the Commissioners directed their solicitor to withdraw all petitions and now take the position that the matter is moot. It is inconceivable that such unilateral action in the face of a supersedeas order can have any such effect.

At the hearing no testimony was taken.[4] None of the documents, including the advertisement for bids, the bids received, and the Commissioners' minutes, were introduced into evidence during the hearing; nor are they in the record certified from the court below. (The appellant has filed a so-called supplemental record containing papers purporting to be these documents.)

Section 2306 of The County Code, 16 P.S. § 2306, provides:

> "The Board of Commissioners may sell or lease . . . any real property belonging to the county. . . . In the event of such sale, or of a lease as lessor under which the lessee acquires on a royalty basis or otherwise the right to drill for oil or gas or to mine or remove coal, stone or other mineral products . . . the commissioners shall petition the court of common pleas, setting forth a description of the property to be sold or leased and the reason therefor. . . . The court shall thereupon fix a day for hearing, notice of which shall be given in at least two newspapers, in said county, of general circulation, once a week for three consecutive weeks. *After hearing*, the court shall make such order and decree as shall seem right and proper. . . ." (Emphasis supplied.)

The proceeding below involved issues of fact and the court below decided this case on facts (confusion in advertising, irregularity in accepting bids and the best interest of the community) without any facts on the record.

[4] Fiore offered as a witness one of the Commissioners, a petitioner, apparently in support of the reasonableness and regularity of the Board's award to Fiore. Although the formal offer was not made until after the court announced its order, we view this irregularity inconsequential in light of the informality of the proceedings.

It is true that the power conferred upon the Commissioners by Section 2306 is discretionary, and when public officials take action in discretionary matters a presumption arises that they are properly acting for the public good. *Parker v. Philadelphia*, 391 Pa. 242, 137 A.2d 343 (1958). Normally they may not be restrained from acting absent allegation and proof of fraud, misconduct, abuse of discretion, or capricious and arbitrary conduct. *Hyam v. Upper Montgomery Joint Authority*, 399 Pa. 446, 160 A.2d 539 (1960). However, Section 2306 requires that the court, in approving the lease, exercise its sound discretion as well. *See Baton Coal Company Appeal*, 365 Pa. 519, 76 A.2d 194 (1950), and *McKees Rocks Borough School District Petition*, 360 Pa. 285, 62 A.2d 20 (1948). Judicial discretion must be exercised upon the facts before the court after a full hearing and due consideration. *Philadelphia County Grand Jury Investigation Case*, 347 Pa. 316, 32 A.2d 199 (1943). No record was developed by the court below upon which it could properly perform its function.

Therefore, we enter the following:

ORDER

AND NOW, this 16th day of July, 1976, the decision of the lower court is reversed and the matter is remanded for an evidentiary hearing and decision on facts established on the record as the law requires.

THEODORE O. ROGERS,
Theodore O. Rogers, *J.*

APPENDIX F

Petition for Rehearing before the Court of Common Pleas (Court *en Banc*) of Westmoreland County, Pennsylvania to Order of September 19, 1975 at No. 2618 of 1975 (Westmoreland County)

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA

IN RE: Lease of coal on County lands situate in Hempfield Township, Westmoreland County, Pennsylvania.

No. 2618 of 1975

TO: The Honorable, the Judges of said Court:

The Petition of Fred Fiore Coal Company, an aggrieved party and interested party, respectfully represents:

1. That he is an interested and aggrieved party in this case.

2. That an Order was entered by this Court against petitioner on September 19, 1975 wherein the Commissioners of Westmoreland County's Petition to approve this agreement and lease for coal on county lands to Fred Fiore Coal Company was denied.

3. That this case should be reheard for the following reasons:

(a) That the reasons set forth by the Court for disapproval are not supported by the evidence of the law in this case and that the aggrieved party will prove this averment by further testimony at rehearing if this petition is granted.

(b) That the Court, in light of oral argument and evidence presented at the hearing on September 19, 1975, abused its discretion by not approving the Commissioners Petition in this case.

(c) That Petitioner, Fred Fiore Coal Company, wishes to show by further proof and testimony that was not presented at the hearing of September 19, 1975, that the approval of the Commissioners Petition would be in the best interest of the people of Westmoreland County; that there was no confusion in advertising and that there were no irregularities in the bidding or acceptance of bids.

(d) That petitioner is the victim of fraud, mistake and coercion or the equivalent thereof.

WHEREFORE, petitioner prays that the case be reheard, and that pending this petition all proceedings be stayed.

EDWARD P. ZEMPRELLI,
Edward P. Zemprelli,
Attorney for Petitioner.

Appendix F—Petition for Rehearing before the Court of Common Pleas (Court en Banc) of Westmoreland County, Pennsylvania to Order of September 19, 1975 at No. 2618 of 1975 (Westmoreland County).

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA

CIVIL ACTION—LAW

In Re: Lease of coal on County lands situate in Hempfield Township, Westmoreland County, Pennsylvania.

No. 2618 of 1975

Heard: September 19th, 1975

Before: David H. Weiss, *P.J.*
L. Alexander Sculco, *J.*
Richard E. McCormick, *J.*

Sitting *en Banc*

PRAECIPE FOR ARGUMENT LIST FOR REHEARING
BEFORE COURT *EN BANC*

1. Please place the above captioned case on the next argument list for rehearing before the Court *en Banc*, at which time a Petition For Rehearing will be presented.

2. The party requesting the rehearing is Fred Fiore Coal Company, an interested party and a person aggrieved by the Order of September 19, 1975 of the Court of Common Pleas of Westmoreland County sitting *en Banc*.

Appendix F—Petition for Rehearing before the Court of Common Pleas (Court en Banc) of Westmoreland County, Pennsylvania to Order of September 19, 1975 at No. 2618 of 1975 (Westmoreland County).

3. The Petition prays that by its petition for rehearing that the Court will grant petitioner a rehearing in order to present further testimony bearing on the Courts' decision which was not presented at the hearing of September 19, 1975.

4. WHEREFORE, Fred Fiore Coal Company, Petitioner, respectfully requests that the above captioned case be placed on the next argument list before the Court *en Banc*, with notice sent to:

H. Reginald Belden, Jr., Esq.
100 North Main Street
Greensburg, Pennsylvania 15601

James R. Kelly, Esq.

B. Patrick Costello, Esq.

Commissioners of Westmoreland County
Dorothy K. Shope
Robert G. Shirey
Ted Simon

The Honorable Judges of the Court of Common Pleas of Westmoreland County:

David H. Weiss, *P.J.*
L. Alexander Sculco, *J.*
Richard E. McCormick

EDWARD P. ZEMPRELLI,
Edward P. Zemprelli,
Attorney for Fred Fiore
Coal Company.

APPENDIX G

Petition for Allowance of Appeal to the Supreme Court of Pennsylvania at No. 1677 Allocatur Docket (less Exhibits Appended hereto at B through E)

IN THE
SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

No. 1677 Allocatur Docket

IN RE: LEASE OF COAL ON COUNTY LANDS SITUATE IN HEMPFIELD TOWNSHIP, WESTMORELAND COUNTY, PENNSYLVANIA.

FRED FIORE, AGGRIEVED PARTY,
Petitioner,

COUNTY OF WESTMORELAND,
Respondent,

WEISS BROTHERS LEASING, INC.,
Respondent.

Petition for Allowance of Appeal from the order of the Commonwealth Court, entered July 10, 1978, at No. 1890 C. D. 1977, affirming the order of the Court of Common Pleas of

Appendix G—Petition for Allowance of Appeal to the Supreme Court of Pennsylvania at No. 1677 Allocatur Docket (less Exhibits Appended hereto at B through E).

Westmoreland County, Pennsylvania, Civil Division-Law, dated August 19, 1977, at No. 2618 of 1975.

RICHARD H. GALLOWAY,
ACKERMAN & GALLOWAY.

11 North Main Street,
Greensburg, Pennsylvania 15601
(412) 836-0700,

EDWARD P. ZEMPRELLI,
528 St. Clair Avenue,
Clairton, Pennsylvania 15025
(412) 233-8803,

Attorneys for Petitioner.

The opinion of the Commonwealth Court is, at this date, unreported officially or unofficially (a copy of said opinion is attached hereto and marked Exhibit A). The Commonwealth Court's order, dated and entered July 10, 1978, is as follows:

> "AND NOW, this 10th day of July, 1978, the order below made August 19, 1977 is affirmed.
>
> /s/ Theodore O. Rogers, *J.*"
> Theodore O. Rogers, *J.*

The questions presented for review are whether the Court of Common Pleas exceeded the scope of its authority and the mandated scope of its review in rejecting the proposed coal lease and whether the Court of Common Pleas had facts before it sufficient to justify its rejection of the proposed coal lease.

In early 1975 the Westmoreland County Commissioners by public advertisement invited the submission, on or before March 18, 1975, of bids for the mining of coal on county land. The advertisement required that bids should be submitted in the form of two alternatives for payment: (1) payment based on tonnage of coal removed, or (2) payment based on a percentage of the per ton sale price of the coal. On July 24, 1975, the commissioners unanimously adopted a resolution awarding the right to mine the property to the petitioner, Fred Fiore, for 21% of the per ton sales price, with the proviso that such percentage could not fall below $5.27 per ton. The latter provision was an amendment offered by Commissioner Ted Simon and adopted by the Board, since Fiore's original bid had been for 21% of the per ton sales price or $5.11 per ton. The Commissioners had earlier, on April 24, 1975, awarded to Weiss Brothers Leasing, Inc., the right of "drilling and test boring on the site." Weiss Brothers Leasing, Inc.'s bid had been 13.17 percent of the per ton sales price or $5.27 per ton.

The Commissioners then presented the Court of Common Pleas of Westmoreland County a petition asking approval of the proposed lease to Fiore, pursuant to Section 2306 of the County Code, Act of August 9, 1955, P.L. 323, as amended, 16 P.S. Section 2306. Without taking any testimony or evidence, the court disapproved the award of the proposed lease to Fiore, in an order dated September 19, 1975 (a copy of said order is attached hereto and marked Exhibit B). Fiore appealed to the Commonwealth Court which reversed the lower court and remanded for an evidentiary hearing, in an opinion and order dated July 16, 1976. *In Re: Lease of Coal on*

Appendix G—Petition for Allowance of Appeal to the Supreme Court of Pennsylvania at No. 1677 Allocatur Docket (less Exhibits Appended hereto at B through E).

County Lands Situate in Hempfield Township, Westmoreland County, Pennsylvania, 25 Pa. Commonwealth Ct. 530, 360 A.2d 849 (1976). (a copy of said opinion and order is attached hereto and marked Exhibit C).

On August 19, 1977, after an evidentiary hearing, the Court of Common Pleas of Westmoreland County again disapproved the lease to Fiore (a copy of said opinion and order is attached hereto and marked Exhibit D). Again the matter was appealed to the Commonwealth Court which, on July 10, 1978, affirmed the lower court's action.

An appeal should be allowed for the following reasons:

1. The precise function of the Court of Common Pleas in approving or disapproving such leases, under the County Code, never has been delineated.

2. The various burdens in such a proceeding have not been established by the appellate courts.

3. The case involves millions of dollars to each of the parties here involved.

4. If the ultimate test to be applied is whether the County Commissioners abused their discretion, there is no evidence to support the conclusion of the lower court or the Commonwealth Court.

5. Because of the greatly deflated coal market, if the order stands, the County of Westmoreland will, in all likelihood suffer losses totaling millions of dollars.

Attached hereto and marked Exhibit E is the full text of Section 2306 of the County Code, Act of August 9, 1955, P.L. 323, as amended, 16 P.S. Section 2306.

WHEREFORE, the petitioner repectfully requests this Honorable Court to allow an appeal in the within matter for the reasons set forth herein.

Respectfully submitted,

EDWARD P. ZEMPRELLI,
Edward P. Zemprelli,

RICHARD H. GALLOWAY,
Richard H. Galloway.

EXHIBIT E

Section 2306. Authority to Sell or Lease Real Property

The board of commissioners may sell or lease, either as lessor or lessee, any real property belonging to the county or to others where the county is lessee. In the event of such sale or of a lease as lessor under which the lessee acquires on a royalty basis or otherwise the right to drill for oil or gas or to mine or remove coal, stone or other mineral products or to cut and remove trees, stumps, wood or other forest products, the commissioners shall petition the Court of common pleas, setting forth a description of the property to be sold or leased and the reason therefor. If the commissioners know or have reason to believe that the property to be sold contains oil, gas, coal, stone, timber or other mineral or forest products of commercial value, such knowledge or belief shall be stated together with the description. The Court shall thereupon fix a day for hearing, notice of which shall be given in at least two newspapers, in said county, of general circulation, once a week for three consecutive weeks.

After hearing, the Court shall make such order and decree as shall seem right and proper. In the case of any lease of county property hereunder, such property, with any and all improvements or additions thereon or thereto, shall, in the hands of the lessee, be subject to taxation by such county and any other political subdivision therein, in the same manner as other real estate located in the county. Such taxes shall be levied and assessed against and paid by the lessee. This section shall not apply to leases or sales of county property or other property which are otherwise specifically provided for by law. 1955, Aug. 9, P.L. 323 Section 2306.

IN THE
SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

IN RE: LEASE OF COAL ON COUNTY LANDS SITUATE IN HEMPFIELD TOWNSHIP, WESTMORELAND COUNTY, PENNSYLVANIA

FRED FIORE, AGGRIEVED PARTY,
Petitioner,

COUNTY OF WESTMORELAND,
Respondent,

WEISS BROTHERS LEASING, INC.,
Respondent.

No. .....

Appendix G—Petition for Allowance of Appeal to the Supreme Court of Pennsylvania at No. 1677 Allocatur Docket (less Exhibits Appended hereto at B through E).

PROOF OF SERVICE

I hereby certify that I am this date serving the foregoing document upon the persons and in the manner indicated below, which service satisfies the requirements of Pa. R.A.P. 121:

Service by first class mail addressed as follows:	Thomas Anton, Attorney for Weiss Brothers Leasing Inc.—Respondent 16 North Pennsylvania Avenue Greensburg, Pennsylvania 15601
Prothonotary, Supreme Court of Pennsylvania, Western District 801 City-County Building Pittsburgh, Pennsylvania 15219 (original plus eight (8) copies plus reproduced record)	Irving L. Bloom, Attorney for County of Westmoreland—Respondent Courthouse Square Greensburg, Pennsylvania 15601

Dated: August 8, 1978

RICHARD H. GALLOWAY,
Richard H. Galloway,
Ackerman & Galloway,
11 North Main Street,
Greensburg, Pennsylvania 15601.

Supreme Court, U. S.
FILED
APR 4 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 78-1360

IN RE: LEASE OF COAL ON COUNTY LANDS SITUATE IN HEMPFIELD TOWNSHIP, WESTMORELAND COUNTY, PENNSYLVANIA.

FRED FIORE, AGGRIEVED PARTY,
Petitioner,

COUNTY OF WESTMORELAND,
Respondent,

WEISS BROTHERS LEASING, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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IN THE

Supreme Court of the United States

No. 78-1360

IN RE: LEASE OF COAL ON COUNTY LANDS SITUATE IN HEMPFIELD TOWNSHIP, WESTMORELAND COUNTY, PENNSYLVANIA

FRED FIORE, AGGRIEVED PARTY,
Petitioner,

COUNTY OF WESTMORELAND,
Respondent,

WEISS BROTHERS LEASING, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

Counter-Statement of Jurisdiction

Respondent Westmoreland County contends that the jurisdiction of the Supreme Court of the United States cannot be invoked under the United States Code, Title 28, Section 1257(3), as contended by Petitioner, for the reason that no valid federal or constitutional question is involved, and for the further reason that Petitioner failed to raise any such federal or constitutional issue before any of the state courts hearing this case below.

Counter-Statement of Constitutional Provisions, Statutes, and Rules of Court Involved

In addition to the constitutional provisions and statutes referred to in the petition for certiorari, Respondent Westmoreland County cites Title 28, United States Supreme Court Rule 23(f), which reads as follows:

> If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (*e. g.*, by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (*e.g.*, ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.

Counter-Statement of the Questions Involved

I. Whether the jurisdiction of the United States Supreme Court may be invoked by Petitioner where the federal questions Petitioner alleges are raised for the first time in the petition for certiorari, never having been raised or argued at any stage of the proceedings before the state courts.

II. Whether it is within the statutory discretion of the Court of Common Pleas of Westmoreland County, Pennsylvania, as affirmed by the Commonwealth Court and Supreme Court of Pennsylvania, to refuse to approve a lease between Respondent Westmoreland County and Petitioner for

mining coal on county lands where there were numerous irregularities in the process of bidding and awarding the proposed lease.

III. Whether the Pennsylvania Courts' exercise of statutory discretion in refusing to approve the lease to Petitioner because of irregularities in the bidding and awarding procedures raises any federal questions cognizable by this Court.

Counter-Statement of the Case

Respondent Westmoreland County adopts Petitioner's Statement of the Case with the following corrections of inaccurate statements or omissions:

The bid submitted by Respondent Weiss Brothers, Inc. provided for payment of $5.27 per ton of coal mined, or 13.17% of the sale price of the coal; the bid submitted by Petitioner Fred Fiore Coal Company provided for payment of $5.11 per ton or 21% of the sale price of the coal.

Contrary to Petitioner's Statement of the Case (p. 6), the contract awarded to Weiss Brothers, Inc. for drilling and test boring on the coal site at Westmoreland County was understood by all parties to the action to be an award of the coal lease to Weiss Brothers, Inc., with the understanding that if the results of the test boring were favorable, Weiss Brothers, Inc. was to submit a proposed lease agreement to the County Solicitor's office for approval of other terms.

Petitioner's Statement of the Case flatly asserts that the record of the hearing held by the Westmoreland County Court *en Banc* on April 1, 1977, and June 17, 1977, fails to disclose evidence of fraud, official misconduct, or arbitrary and capricious abuse of power in the award of the coal lease; however, the record affirmatively establishes evidence of

substantial irregularities including the County Commissioners' duplicate and inconsistent awarding of the lease in question and Petitioner's impermissible modification of its bid.

Finally, Respondent Westmoreland County disputes Petitioner's claim that the issues asserted in the petition for certiorari were raised before the courts below. In fact, the only issues raised below concerned the scope of discretion permitted the Pennsylvania courts in reviewing a proposed lease of county real estate and the sufficiency of the evidence presented to justify the Westmoreland County Court *en Banc* in denying approval of the lease in question.

REASONS FOR DENYING THIS WRIT

I. The jurisdiction of the United States Supreme Court may not be invoked by Petitioner where the federal questions Petitioner alleges are raised for the first time in the petition for certiorari, never having been raised or argued at any stage of the proceedings before the state courts.

Contrary to Petitioner's contentions, Respondent County of Westmoreland asserts that the instant case involves no federal questions, substantial or otherwise, and that, therefore, this Court has no jurisdiction to decide the questions involved herein (see discussion in Argument, Section III, *infra*). Further, assuming that federal questions are involved, we submit that Petitioner failed to raise these questions in any of the courts below and, thus, is precluded from raising them for the first time in a petition for certiorari. See *Tacon v. Arizona*, 410 U.S. 351, 35 L.Ed. 2d 346, 93 S.Ct. 998 (1973); *Cardinale v. Louisiana*, 394 U.S. 437, 22 L.Ed. 2d 398, 89 S.Ct. 1162 (1969).

To insure that a party has, in fact, raised a federal question in the lower courts, this Court's Rules, Title 28 United States Code, United States Supreme Court Rule 23(f), require that in its petition for certiorari, Petitioner state the stage of the proceedings at which it raised the question, the specific method and manner it raised the question, the way the lower courts passed on the question, and specific quotations from the record where the question appears as would establish that Petitioner previously raised the question in a timely and proper fashion so as to furnish this Court with jurisdiction. The instant petition merely asserts generally that counsel raised the federal questions in argument, objections, and appeals, without specific reference to where in the record it raised these questions and without stating the way in which the lower courts passed on them. We submit that Petitioner failed to comply with Rule 23(f) because it was unable to do so.

Indeed, an examination of Petitioner's written requests for review submitted to the courts below substantiates that Petitioner never articulated any federal question prior to its petition herein. [See petition for certiorari, Appendices F and G; hereinafter all references to appendices refer to appendices in the petition for certiorari.] In addition, the fact that none of the Pennsylvania Courts' opinions in this case dealt with federal questions further substantiates this contention. [See Appendices B, C, D and E.] We submit, and the records will show, that Petitioner only raised the questions of the degree of discretion the Pennsylvania statute accorded the Westmoreland County Court of Common Pleas in reviewing the Westmoreland County Commissioners' proposed lease of the county's real property and the sufficiency of evidence presented at the evidentiary hearing to justify the court's refusal to approve the lease in question. In proceedings

before the Pennsylvania Courts, Petitioner never made the slightest allusion to any issues concerning the separation of powers, the alleged unconstitutional vagueness of the state statute, or the alleged deprivation of property without due process—questions that it now seeks to raise before this Court.

Although Petitioner may contend, albeit without force, that these issues were raised by inference from facts of the case, this Court has held that the assertion of a federal claim must be made unmistakably and not left to mere inference. *Thomas v. Iowa*, 209 U.S. 285, 52 L.Ed 782, 28 S.Ct. 487 (1908); *Mutual Life Insurance Co. of New York v. McGrew*, 188 U.S. 291, 309-310, 47 L.Ed. 480, 485, 23 S.Ct. 375 (1903). This Court has also held that the appellant must specify in the lower courts the clause in the Constitution under which it asserts a claim. *Mutual Life Insurance Co., supra; New York Central & Hudson River Railroad Co. v. City of New York*, 186 U.S. 269, 272-273, 46 L.Ed. 1158, 1160, 22 S.Ct. 916 (1902). Since Petitioner has patently failed to articulate any federal questions in the courts below, and thus, no lower court has had an opportunity to rule on such questions, Petitioner cannot, at this, the latest stage in the case, raise such questions. Accordingly, we respectfully request this Court to deny certiorari.

II. It is within the statutory discretion of the Court of Common Pleas of Westmoreland County, Pennsylvania, as affirmed by the Commonwealth Court and Supreme Court of Pennsylvania, to refuse to approve a lease between Respondent Westmoreland County and Petitioner Fiore for mining coal on county lands where there were numerous irregularities in the process of bidding and awarding the proposed lease.

Contrary to the arguments of Petitioner, the scope of review by Pennsylvania courts in matters of this nature is not limited to fraud, official misconduct, bad faith, capricious actions or abuse of power. This strict standard is to be applied in cases where the courts are requested to enjoin certain actions of public officials who are performing their official duties. See, *e.g., Blumenschein v. Pittsburgh Housing Authority*, 379 Pa. 566, 109 A.2d 311 (1954) (action to enjoin eminent domain proceedings); *Hyam v. Upper Montgomery Joint Authority*, 399 Pa. 446, 160 A.2d 539 (1960) (action to enjoin proceeding with plans for sewage treatment plant and related system). In such cases involving the exercise of their general equity powers, the courts refrain from substituting their own judgment and discretion for that of the administrators appointed by law to carry out specific governmental duties.

In the present case, however, the Pennsylvania Legislature has specifically directed that the courts should conduct a hearing and ". . . make such order and decree as shall seem right and proper . . ." Act of August 9, 1955, P.L. 323, § 2306 (16 P.S. § 2306). In its interpretation of this section the Pennsylvania Commonwealth Court, citing decisions of the Supreme Court of Pennsylvania, has twice said in the instant case:

> It is true that the power conferred upon the Commissioners by Section 2306 is discretionary, and when public officials take action in discretionary matters a presumption arises that they are properly acting for the public good. *Parker v. Philadelphia*, 391 Pa. 242, 137 A.2d 343 (1958). Normally they may not be restrained from acting absent allegation and proof of fraud, misconduct, abuse of discretion, or capricious and arbitrary conduct. *Hyam v. Upper Montgomery Joint Authority*, 399 Pa. 446, 160 A.2d 539 (1960). *However, Section 2306 requires that the court, in approving the lease, exercise its sound discretion as well.* See *Baton Coal Company Appeal*, 365 Pa. 519, 76 A.2d 194 (1950), and *McKees Rocks Borough School District Petition*, 306 Pa. 285, 62 A.2d 20 (1948) (emphasis added).
>
> [Appendix E, p. 39; Appendix B, p. 20-21]

The opinions of Judge Rodgers for the Commonwealth Court of Pennsylvania and Judge McCormick for the Court of Common Pleas of Westmoreland County clearly substantiate the existence of substantial irregularities in the procedures followed in awarding the lease in question, thereby justifying the courts' exercise of discretion in denying approval of the proposed lease.

After conducting an evidentiary hearing, the Westmoreland County Court *en Banc* made a factual finding that the actions taken by the County Commissioners on April 24, 1975, constituted an award of the coal lease to Weiss Brothers, Inc. as the "highest and best bidder in response to the advertisement soliciting bids" [Appendix C, p. 25]. Later, on July 24, 1975, the County Commissioners reversed themselves and awarded the coal lease to Petitioner, again allegedly as the highest and best bid. In itself this attempt to renege on Respondent Weiss Brothers' contract and make a second award of the lease constitutes a violation of Pennsylvania bid law, justifying court disapproval of the latter agreement with

Petitioner. Under Pennsylvania law, once bids are opened and one party is determined to be the best responsible bidder, the award must be made to that bidder or all bids must be rejected. *Schuck v. School District of Baldwin Township*, 296 Pa. 408, 146 A. 24 (1929); *Hibbs v. Arensberg*, 276 Pa. 24, 119 A. 727 (1923); *Louchheim v. Philadelphia*, 218 Pa. 100, 66 A. 1121 (1907). Once a contract was awarded to Weiss Brothers as best bidder, the Commissioners were barred from changing their minds and awarding the same contract to Petitioner.

The Westmoreland County Court *en Banc* found that this irregularity was further compounded by the County Commissioners' attempt on October 9, 1975, to petition the court for approval of the original lease of the coal to Weiss Brothers and their attempt on December 21, 1975, to withdraw all petitions for approval of leases to either Weiss Brothers or Petitioner. The court *en banc* found that this vacillation by the County Commissioners made it impossible for the court to determine which action should be recognized as the true discretionary decision of the County Commissioners. Thus, the court stated:

> The Court cannot in good conscience recognize the action of the Board of Commissioners of Westmoreland County on July 24, 1975, as being valid and disregard the actions of the Board of County Commissioners on April 25, October 9 and December 31 of 1975. To do so would amount to the Court substituting its discretion for that of the County Commissioners on the action taken by the Commissioners on all of the dates with the exception of July 24, 1975. It is the opinion of this Court that the various actions of the Board of County Commissioners, *i.e.*, on April 24, 1975, July 24, 1975, October 9, 1975 and December 31, 1975 were not consistent with each other nor are they consistent with the Petition and proposed agreement now before the Court.
>
> [Appendix C, p. 28]

Under such circumstances the Pennsylvania courts were certainly justified in determining that they should not lend their approval to the imbroglio created by the Commissioners' inconsistent actions.

The Westmoreland County Court *en Banc* found another irregularity in the fact that the royalty payment terms of the lease presented for court approval differed from the terms of the bid submitted by Petitioner. While Petitioner's bid offered payment of 21% of the sale price of the coal mined or $5.11 per ton of coal, its proposed lease terms were 21% of the sale price or $5.27 per ton of coal. Under Pennsylvania bid law such a modification of bid terms is impermissible, *Louchheim v. Philadelphia, supra,* especially under circumstances which led the Westmoreland County Court *en Banc* to determine that private negotiations had been entered into between Petitioner and the County Commissioners between the time of awarding the lease to Weiss Brothers and the subsequent award of the lease to Petitioner [Appendix C, p. 30].

The Commonwealth Court of Pennsylvania found that the circumstances presented too many uncertainties as to exactly what was awarded to Weiss Brothers by the County Commissioners' resolution of April 24, 1975, and as to the process whereby Petitioner's bid price of $5.11 per ton was changed to an award at the price of $5.27 per ton, and therefore concluded that the Westmoreland County Court *en Banc* had "exercised a sound discretion in refusing to approve the proposed lease to Fiore" [Appendix B, p. 20].

III. The Pennsylvania Courts' exercise of statutory discretion in refusing to approve the lease to Petitioner because of irregularities in the bidding and awarding procedures raises no federal questions cognizable by this Court.

Respondent Westmoreland County submits that no federal questions are involved in this case. Although Petitioner contends that broad constitutional principles, such as separation of powers and due process are involved herein, we submit that each of Petitioner's constitutional arguments is specious and wholly without merit.

Petitioner contends that the doctrine of separation of powers precludes the judiciary from disturbing an executive's decision absent fraud or unless the executive exceeds its authority. Assuming *arguendo* that this accurately states the proper constitutional relationship between the federal judiciary and federal executive branches of government, it is inapplicable to this case, which solely involves branches of state government. Nothing in the Federal Constitution mandates a separation of powers with respect to state branches of government. Thus, the only question in this case is whether the Pennsylvania statute, which grants the judiciary certain discretion in deciding whether to approve a lease, violates the Pennsylvania Constitution. Clearly, this case raises no *federal* question relating to the separation of powers.

Nor does this case raise any other federal questions. Petitioner contends that the Pennsylvania Courts' refusal to approve Petitioner's lease unconstitutionally impaired its contract with the Westmoreland County Commissioners. Initially, it must be noted that to succeed in its argument, Petitioner must show that it had a contract under the existing laws of the state, and that after the making of the contract, the state legislature passed a law impairing the prior contract. *Oshkosh Waterworks Co. v. City of Oshkosh,* 187 U.S. 437, 446,

47 L.Ed. 249, 253, 23 S.Ct. 234 (1903). The undisputed facts in this case establish that the existing laws of Pennsylvania required that the Westmoreland County Court of Common Pleas approve the tenative lease *before* it would be final and binding [Section 2306 of the County Code, Act of August 9, 1955, P.L. 323, 16 P.S. § 2306]; since the court never approved Petitioner's lease, no enforceable contract ever existed between Petitioner and the Westmoreland County Commissioners. Thus, Petitioner never had a contract that could have been subject to unconstitutional impairment.

Assuming *arguendo* that a contract existed, the statute under which the Westmoreland County Court refused to approve the lease was in effect *prior to* the making of the alleged contract. This Court has specifically held that "the contract clause of the Constitution of the United States has reference only to a statute of a state enacted *after* the making of the contract whose obligations is alleged to be impaired". *Oshkosh Waterworks Co., supra,* 187 U.S. at 446, 47 L.Ed. at 253 (emphasis added). Thus, Petitioner's alleged contract could not have been unconstitutionally impairment by legislative enactment.

Moreover, as Petitioner concedes in its petition for certiorari, this clause of the Constitution only applies to *legislative* enactment of statutes after a contract has been made and not to changes in *judicial* interpretations of a statute after a contract has been made. *Tidal Oil Co. v. Flanagan,* 263 U.S. 444, 6 L.Ed. 2d 386, 44 S.Ct. 199 (1923). Thus, assuming *arguendo* that the Pennsylvania courts modified their interpretation of the degree of judicial discretion accorded the courts by the statute involved herein, this action does not violate the constitutional prohibition regarding impairment of contracts. Accordingly, Petitioner's entire argument on this issue is disingenous and wholly without merit.

Petitioner's final and equally unmeritorious argument is that the statute on its face or as applied fails to set reasonably clear standards to be followed by the court for reviewing a proposed lease, in violation of the due process clause of the Constitution. In positing this void-for-vagueness contention, the only case Petitioner cites is *Smith v. Groguen,* 415 U.S. 566, 39 L.Ed. 2d 605, 94 S.Ct. 1242 (1974), a *criminal* case involving first amendment issues. Indeed, the entire void-for-vagueness doctrine rests on the due process theory that " 'men of common intelligence' not be forced to guess at the meaning of the *criminal* law". Smith, *supra,* 415 U.S. at 574, 39 L.Ed. 2d at 612 (emphasis added). This theory, although necessary to carry out the policy of strictly construing criminal statutes, is inapplicable to a *civil* statute, as involved herein.

Conclusion

It is submitted that this case involves no federal questions, and that even assuming *arguendo* that it does, Petitioner failed to raise any such federal questions in the courts below and, thus, is precluded from raising them before this Court. In any event, the Pennsylvania Courts appropriately exercised their sound discretion in refusing to approve the coal lease in question since there were numerous irregularities in the procedures of bidding, negotiation, and petitioning for court approval. For the reasons set forth in the foregoing Argument, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

IRVING L. BLOOM,
Attorney for Respondent,
County of Westmoreland.

Supreme Court, U. S.
FILED
APR 4 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 78-1360

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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WEISS BROTHERS LEASING, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

Counter-Statement of Jurisdiction

It is the contention of the respondent Weiss Bros. Leasing, Inc. that the jurisdiction of the Supreme Court of the United States cannot be invoked under the United States Code, Title 28, Section 1257 (3), as contended by Petitioner Fiore, for the reason that no valid Federal or Constitutional question is involved, and for the further reason that Petitioner failed to raise a Federal or Constitutional issue before any of the State Courts hearing this case below.

Counter-Statement of the Case

Respondent Weiss Bros. Leasing, Inc. adopts Petitioner's statement of the case with the following corrections of inaccurate statements or omissions:

The evidence clearly indicates that Weiss Bros. Leasing, Inc. of McKeesport, Pennsylvania was the highest and best bidder in response to the advertisement of the County Commissioners soliciting bids. Weiss Bros. Leasing, Inc. by bid provided for payment of $5.27 per ton of coal mined, or 13.17% of the sale price of the coal. There were eight other bids submitted, the next highest being that of the Petitioner, Fred Fiore Coal Company, which provided for payment of $5.11 per ton, or 21% of the sale price of the coal. The testimony is just as clear that the County Commissioners when they made their award on April 24, 1975 to Weiss Bros. Leasing, Inc. were making an award to the highest and best bidder in response to the advertisement soliciting bids. Their then Chief Solicitor, H. Reginald Belden, Jr., testified that he felt the award made on that date was an award to Weiss Bros. Leasing, Inc. for the leasing of coal. He, pursuant to his instructions from the County Commissioners, specifically requested Weiss Bros. Leasing, Inc. to submit a Proposed Lease to the County Commissioners which Lease was prepared and submitted by Weiss Bros. Leasing Inc. to the Westmoreland County Board of Commissioners. Mr. Belden also testified that he felt the award made on July 24, 1975 to Fred Fiore Coal Company was also an award to enter into a lease agreement for the coal on the Westmoreland County property.

The Record of the hearing held by the Westmoreland County Courts on April 1, 1977 and June 17, 1977 discloses considerable evidence of irregularities by the Board of County Commissioners in their attempts to have

the coal removed by a responsible contractor and proper royalty payments made to the County of Westmoreland. The awarding by the County Commissioners on April 24, 1975 to Weiss Bros. Leasing, Inc., the making of an award to Fred Fiore Coal Company on July 24, 1975, the action of the Board of County Commissioners on October 9, 1975 authorizing the County Solicitor to petition the Court to lease the rights of the coal on the Westmoreland Manor property to Weiss Bros. Leasing, Inc., the action of the Westmoreland County Commissioners on December 31, 1975 advising the County Solicitor to withdraw the petitions to the Court of Common Pleas of Westmoreland County and the Commonwealth Court of Pennsylvania requesting approval for strip-mining of the coal on Westmoreland property in regard to both the petitions of Weiss Bros. Leasing, Inc. and Fred Fiore Coal Company, and the attempt of the County Commissioners to award to the petitioner Fiore a lease for a royalty payment which differed from the actual bid submitted by Fred Fiore Coal Company which was $5.11 per ton rather than ". . . no less than $5.27 per ton . . ." as was set forth in the petition submitted to the Westmoreland County Court *en Banc*.

With the exception of the Board of County Commissioner's action on April 24, 1975, none of the above actions of the County Commissioners conforms with the law on normal bidding procedures. The respondent Weiss Bros. Leasing, Inc. does not agree with petitioner that the Federal issues asserted in Fiore's Petition for Certiorari were raised in the Courts below. Nowhere in the briefs or oral arguments before the Courts below were any such issues raised.

Statement of Questions

I. Were there any abuses of discretion by the Pennsylvania Courts in refusing to approve the lease to Fred Fiore Coal Company, which raised any Federal questions recognized by this Court?

II. Did the Court of Common Pleas of Westmoreland County, Pennsylvania, as affirmed by the Commonwealth and Supreme Courts of Pennsylvania, acting within its statutory discretion in refusing to approve a lease between the respondent Westmoreland County and Petitioner Fiore for mining coal on County property where there were irregularities in the bidding process and in the awarding of the proposed lease, violate any Federal statutory or Constitutional mandates?

Reasons for Refusing Petitioner's Writ

I. We submit that Petitioner failed to comply with the requirements of this Court's Rule 23 (f) (U.S. Sup. Ct. Rule 23 (f), 28 USCA). Rule 23 (f) requires that in a Petition for Certiorari, Petitioners state the stage of the proceedings at which it raised a Federal question, the specific method and manner in which it raised the question and the way the Lower Courts passed on the question. The Petitioner is required to set forth in its petition the specific quotations from the Record that would establish that Petitioner previously raised the question in a timely and proper fashion so that this Court shall have jurisdiction. Although the Petition asserts that Petitioner did raise the Federal question throughout the proceedings in Pennsylvania Courts, no specific reference is made as to where in the Record these questions were raised and the action of the Pennsylvania Courts in regard to the questions. If, as Petitioner would have us believe, these issues

had been raised in the Pennsylvania Courts, certainly said Courts would have discussed the questions in their respective Opinions. These Opinions are void as to any Federal questions.

This Court has held that the assertion of a Federal claim must be made clearly and not left to mere inference. *Thomas v. Iowa*, 209 U.S. 258, 52 L.Ed 782, 28 S. Ct. 487 (1908); *Mutual Life Insurance Company of New York v. McGrew*, 188 U.S. 291, 309-310, 47 L.Ed. 480, 485, 23 S. Ct. 375 (1903).

We respectfully submit that Petitioner cannot at this point raise Federal questions which they failed to present in the Courts below.

II. The arguments of the Petitioner that the Pennsylvania Courts are limited in their review powers do not have merit. The Act of August 9, 1955, P.L. 323, Section 2306 (16 P.S. Section 306) specifically directs that the Courts should conduct a hearing and ". . .make such order and decree as shall seem right and proper. . . .". Judge Rodgers in his Opinion for the Pennsylvania Commonwealth Court in regard to this case cited decisions of the Supreme Court of Pennsylvania as follows:

> "It is true that the power conferred upon the Commissioners by Section 2306 is discretionary, and when public officials take action in discretionary matters a presumption arises that they are properly acting for the public good. *Parker vs. Philadelphia*, 391 Pa. 242, 137 A.2d 343 (1958). Normally they may not be restrained from acting absent allegation and proof of fraud, misconduct, abuse of discretion, or capricious and arbitrary conduct. *Hyam v. Upper Montgomery Joint Authority*, 399 Pa. 446, 160 A.2d 539 (1960). *However, Section 2306 requires that the court, in approving the lease, exercise its sound discretion as well.* See *Baton Coal Company Appeal*, 365 Pa. 519, 76 A.2d 194 (1950), and *McKees*

Rocks Borough School District Petition, 360 Pa. 285, 62 A.2d 20 (1948). 25 Pa. Commonwealth Ct. at 534, 360 A.2d at 851." (emphasis added).

It is obvious from their Opinions that Judge Rodgers for the Commonwealth Court and Judge McCormick for the Court of Common Pleas of Westmoreland County were appalled at the inconsistencies and irregularities which took place in the attempts to have a lease agreement entered into for the coal property of Westmoreland County. Judge McCormick, speaking for the Westmoreland County Court *en Banc* stated:

> "The Court cannot in good conscience recognize the action of the Board of Commissioners of Westmoreland County on July 24, 1975 as being valid and disregard the actions of the Board of County Commissioners on April 24, October 9 and December 31, 1975. To do so would amount to the Court substituting its discretion for that of the County Commissioners on the action taken by the Commissioners on all of the dates with the exception of July 24, 1975. It is the opinion of this Court that the various actions of the Board of County Commissioners, i.e. on April 24, 1975, July 24, 1975, October 9, 1975 and December 31, 1975 were not consistent with each other nor are they consistent with the Petition and proposed agreement now before the Court."

For the Court *en Banc* of Westmoreland County to act differently from the manner in which it did would constitute a gross abuse of discretion under all of the circumstances before it.

A review of the Record of the hearing before the Court *en Banc* of Westmoreland County clearly indicates the Commissioners' intention to enter into a lease agreement for the stripping and mining of the coal on the Westmoreland County property with Weiss Bros. Leasing, Inc. Weiss Bros. Leasing,

Inc. was the highest bidder and was instructed by the County Solicitor to prepare a lease agreement, which was done. In addition, Weiss Bros. Leasing, Inc. applied for and was issued a mining permit for the subject coal property by the Pennsylvania Department of Environmental Resources. This could not have been done without the compliance by the Board of County Commissioners with certain rule requirements of the Department of Environmental Resources.

The Pennsylvania Supreme Court in the case of *Pearlman v. Pittsburgh, et al.*, 304 Pa. 25, p. 25 speaking generally as to the concept, stated:

> ". . .it is a novel proposition that the bid of a perfectly responsible party can be ignored. . . .the statute requires that contracts be awarded to the lowest responsible bidder and the Courts hold it is for the municipal authorities to exercise a sound discretion to determine who is such. . . ."

The opinion set forth in the Pearlman case was supported in an Opinion by Mr. Justice Kephard speaking for the Court in *Hibbs v. Aresnberg*, 276 Pa. 24, p. 29 when the Court said:

> ". . .though the Directors were not bound in law to give the contract to the lowest bidder, who might be irresponsible, they were bound to investigate, and if a bidder measured up to the law's requirement as a responsible party, the Board could not capriciously award the contract to another. . . ."

The County Commissioners in the present case did not give notice to Weiss Bros. Leasing, Inc. to whom they had already made an award nor to any other party in interest of the award to the Petitioner Fiore. It is obvious that subsequent to the award by the County Commissioners on April 24, 1975, the Commissioners and Fiore entered into private negotiations out of which the action of the Board of Commissioners on July 24, 1975 emerged.

In the instant case, pursuant to a newspaper advertisement, nine bids were received by the Controller of Westmoreland County. Among others Fred Fiore Coal Company submitted a bid based upon the tonnage of coal removed at the rate of $5.11 per ton. The bid of Weiss Bros. Leasing, Inc. based on the tonnage of coal removed was $5.27 per ton. Both of these bids were dated March 18, 1975 and were opened by the County Commissioners on that date. On April 24, 1975 the bid of Weiss Bros. Leasing, Inc. was accepted. On July 24, 1975 the County Commissioners made an award to Fiore Coal Company at a price which was different from the actual bid submitted by Fiore. On October 9, 1975 the County Commissioners authorized the County Solicitor to petition the Court *en Banc* to approve a coal lease to Weiss Bros. Leasing, Inc. On December 31, 1975 the County Commissioners instructed the County Solicitor to withdraw the petitions for approval of lease agreements to the Court of Common Pleas of Westmoreland County. All of these actions by the Board of County Commissioners were inconsistent with each other. The Court *en Banc* of Westmoreland County obviously agrees that there were considerable inconsistencies and irregularities throughout this matter and therefore disapproved the Petition accordingly. The Commonwealth Court of Pennsylvania also agreed with the Westmoreland County Court *en Banc*. Judge Rodgers of the Commonwealth Court stated in his Opinion that the Lower Court had ". . .exercised a sound discretion in refusing to approve the proposed lease to Fiore".

Conclusion

Respondent Weiss Bros. Leasing, Inc. respectfully submits that there are no Federal questions involved in this matter. There is no unconstitutional impairment of contract between Fiore and Westmoreland County Commissioners. Under the statute here before the Court, there is no contract until a contract or lease is submitted to the Court for approval and is approved by the Court. Section 2306 of the County Code, Act of August 9, 1955, P.L. 323, 16 P.S. 2306.

It is further submitted that the Petitioner fails to raise any issues which constitute Federal Questions at any stage of this case and therefore is precluded from raising them before this Court. There is no evidence that the Pennsylvania Courts exercised anything but sound discretion in refusing to approve the coal lease submitted since there were numerous inconsistencies and irregularities in the procedures followed by the County Commissioners and Fred Fiore Coal Company. For these reasons, the Petition of Fred Fiore should be denied.

Respectfully submitted,

THOMAS ANTON,
Attorney for Respondent—
Weiss Brothers Leasing, Inc.